JD(ATL)-20-14 Gulfport, MS Destrehan, LA

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

RPM PIZZA, LLC

and

CASE 15-CA-113753

DALE FIRMIN, an Individual

Beauford D. Pines, Esq., for the General Counsel. Michael D. Carrouth, Esq., J. Hagood Tighe, Esq., and Reyburn W. Lominack, III, Esq. (Fisher & Phillips, LLP), of Columbia, South Carolina, for the Respondent.

#### **DECISION**

#### STATEMENT OF THE CASE

**DONNA N. DAWSON, Administrative Law Judge**. Based on a charge filed by Dale Firmin (Charging Party or Firmin) on September 20, 2013, and an amended charge filed on December 6, 2013, the Region Director of the National Labor Relations Board (NLRB) issued a complaint and notice of hearing on December 31, 2013. An amended complaint (the complaint) was issued on January 16, 2014. The complaint alleges that RPM Pizza, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing an arbitration agreement that requires employees to waive any rights to resolution of any employment-related disputes by class or collective actions in any forum, judicial or arbitral. The complaint also alleges that Respondent violated Section 8(a)(1) in this manner by demanding that Charging Party Dale Firmin (Firmin) relinquish his class or collective action claim filed in federal court or face attorney's fees, costs, and losses, and when it moved to have Firmin's class arbitration claim dismissed. The Respondent filed an answer (and amended answer) denying that it engaged in the unfair labor practices alleged and asserting a variety of affirmative defenses.

On April 4, 2014, I granted the parties' joint motion to submit this case to me for a decision on stipulated facts, thus waiving a hearing under Section 102.35 (a)(9) of the Board's Rules and Regulations. Thereafter, the parties filed briefs, which I have read and considered.

Based upon the entire stipulated record, and after thoroughly considering both parties' briefs, I make the following

#### FINDINGS OF FACT

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#### I. JURISDICTION

The parties stipulated to the following facts as to the nature of the Respondent's business and jurisdiction:

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1. At all material times, Respondent, has been a limited liability company incorporated in Mississippi, and with a principal place of business in Gulfport, Mississippi. Respondent conducts business in several locations including Destrehan, Louisiana, where it engages in the retail sale of pizza and related products.<sup>1</sup>

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2. During the 12 months prior to the submission of the stipulated record, Respondent derived revenues in excess of \$500,000, and has directly purchased and received at its Destrehan, Louisiana store goods and products in excess of \$5000 from suppliers located outside the State of Louisiana.

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3. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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#### II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Background Facts

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1. Respondent's arbitration agreement

In 2011, Respondent RPM introduced an arbitration procedure, including an arbitration agreement (AA), that provided that Respondent and all of its employees must submit, with certain exceptions set forth therein, all claims, disputes, and controversies that either party may have against the other to binding arbitration. Specifically, this AA provides in pertinent part the following:<sup>2</sup>

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**B.** Claims Excluded from Binding Arbitration. Nothing herein shall prevent Team Member from filing and pursuing administrative proceedings before the

Respondent operates stores in various locations in at least three states, Alabama, Louisiana, and Mississippi. (See Joint Exhibit 1). As set forth below, Firmin applied to and was hired to work in the Destrehan, Louisiana store.

Respondent also refers to all of its employees as "Team Members." In Respondent's AA, "Team Member" includes all of Respondent's employees in all offices and store locations, from top-level management officials (e.g. vice presidents, managing directors, regional directors) to local store managers, and to all non-management employees such as drivers. (See Joint Exhibit 1).

- U.S. Equal Employment Opportunity Commission or an equivalent state or local agency to the full extent as permitted by law notwithstanding the existence of an agreement to arbitrate. Although, if Team Member chooses to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to arbitration. Likewise, nothing in this Agreement prevents a party from participating in any investigation or proceeding conducted by any administrative agency. Nothing herein shall prevent Team Member or Company from a temporary restraining order or preliminary injunctive relief to preserve the status quo or prevent any irreparable harm pending the arbitration of the underlying claim, dispute and/or controversy. The only exceptions to the mandatory arbitration provision, besides those listed in this paragraph, are as follows:
  - (1) Any claim, dispute, and/or controversy arising under the National Labor Relations Act ("NLRA") that are brought before the National Labor Relations Board:
  - (2) Any claim, dispute, and/or controversy for medical and disability benefits under Workers' Compensation or any claim for Unemployment Compensation filed with the state that the Team Member resides in;
  - (3) Any claim, dispute, and/or controversy on an individual basis only which are brought properly in, and only to the extent they remain in, small claims court;
  - (4) Any claim, dispute, and/or controversy arising out of any other written contract(s) between Team Member and the Company where the contract specifically provides for resolution through the courts; and
  - (5) Any claim, dispute, and/or controversy for benefits under a Company plan in which the plan provides its own arbitration procedure (such as a claim involving a Company health plan in which the health provider has its own arbitration procedure agreed to by the Team Member).

#### **III. Arbitration Procedure.**

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A. Form of Arbitration and Waiver of Multi-Plaintiff Litigation. In any arbitration, any claim shall be arbitrated only on an individual basis and not on a class or private attorney general basis. Team Member and the Company expressly waive any right to arbitrate as a class representative, as a class member, in a collective action, or in or pursuant to a private attorney general capacity, and there shall be no joinder or consolidation of parties. All arbitration shall be brought on a separate and individual basis. This waiver does not prohibit a Team Member's right to act in concert with other applicants or Team Members under the NLRA, and Team Members will not be subject to discipline or relation for challenging this waiver of multi-plaintiff litigation through a class or collective action.

IV. Dismissal of Any Lawsuit. [T]he Company and Team Member agree that if 5 either pursues a covered claim against the other by any method under than the arbitration provided herein, and an exception does not apply, the responding party is entitled to a dismissal, stay and/or injunctive relief regarding such action, and the recovery of all damages in responding, to include related attorney's fees, costs, and losses.

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V. Waiver of Jury Trial. TEAM MEMBER AND THE COMPANY UNDERSTAND THAT BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH GIVE UP THEIR RIGHT TO TRIAL BY JURY OF ANY INDIVIDUAL, CLASS, COLLECTIVE ACTION, MULTIPLE-PARTY, PRIVATE ATTORNEY GENERAL, OR OTHER CLAIM EITHER MAY HAVE AGAINST THE OTHER, EXCEPT AS EXPRESSLY PROVIDED HEREIN.

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VI. Exclusive Opt-Out Right. The Team Member has the right to opt out of the obligation set forth herein to submit to binding arbitration. To opt out, the Team Member must send via electronic mail or first-class mail, within thirty (30) calendar days of signing this Arbitration Agreement, an email/letter addressed to glennm@rpmpizza.com or mail to Glenn A. Mueller, 15384 5<sup>th</sup> Street, Gulfport, MS 39503 stating that the Team Member has elected to opt out of the Arbitration Agreement. The email/letter must clearly state the Team Member's name and must be signed by the Team Member. Absent the proper and timely exercise of this opt-out right, the Team Member will be required to arbitrate all disputes covered by this Arbitration Agreement.

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MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS. I UNDERSTAND THAT, UNLESS I TIMELY SEND THE OPT-OUT LETTER REFERENCED ABOVE TO THE PROPER

ADDRESSEE, I WILL BE REQUIRED TO ARBITRATE ALL DISPUTES WITH THE COMPANY THAT ARE COVERED BY THIS ARBITRATION

AGREEMENT.

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 $(Jt. Exh. 1.)^3$ 

In summary, and relevant to this matter, Respondent's AA requires that all employmentrelated disputes with its employees be resolved as individual claims exclusively through final

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Abbreviations used in this decision are as follows: "Tr." For transcript: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

arbitration. In other words, parties to a dispute cannot pursue claims related to the dispute, individually or collectively, or by class, in any judicial or court forum. If a party does file such an action, the responding party can bring a dismissal, stay, and/or injunctive relief regarding such action, and recover all damages in responding, to include related attorney's fees, costs, and losses. The AA specifically excludes "[a]ny claim, dispute, and/or controversy arising under the National Labor Relations Act (NLRA) that are brought before the National Labor Relations Board." Finally, the AA includes an opt-out provision, provided the employee/team member opts out in writing pursuant to the terms of the AA within 30 calendar days of signing the AA via email or letter addressed to Respondent's chief executive officer, Glenn A. Mueller (Mueller).

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#### 2. Roll out of Respondent's arbitration procedure and agreement

Respondent's roll out of its new AA process included inviting employees to question and answer sessions conducted by district managers, as well as other several face-to-face meetings with employees from February through June 2011, in which Respondent explained the new process and gave its employees copies of the AA and an applicant acknowledgement form. These communications also included a memorandum issued by its controller, Jeanne Quesenberry (Quesenberry), to store employees during this same period, and to office staff who do not work in the stores in August 2011, that generally explained the arbitration procedure, and its opt-out process, along with various benefits of "final and binding" arbitration (i.e., elimination of the costs and delay associated with long trials and provision of "a fair and reasonable judgment by an outside legal party"). The memorandum also notified then employed employees that the AA was voluntary for all employees hired prior to January 1, 2011. (R. Exhs. 1–3; Jt. Exh. 1.) Of note, between September 8, 2011, and November 14, 2011, nine employees submitted email messages or letters expressing their desire to opt out of the AA.

Regarding applicants for employment on January 1, 2011, and thereafter, Respondent has required them to review information about its arbitration procedure and AA as part of its on line application process. Although applicants may view the AA from an outside computer, in completing the on line application process, they must meet with the store manager and, using Respondent's computer in the store manager's office, complete the application process. In completing the application or on boarding process, applicants must click on the screen to indicate that they have read and agree with the AA before the computer will proceed to the next screen. Applicants confirm their understanding and acceptance of and agreement with the AA with an electronic signature and date on an applicant acknowledgment form. (R. Exh. 4–5.) Mueller authorizes Respondent's on line process.

3. Charging Party Firmin

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Firmin worked for Respondent as a pizza delivery driver on five different occasions between January 2001 and January 1, 2013. His most recent employment period began in November 2012. On November 21, 2012, Firmin met with Store Manager Scott Green (Green) at Respondent's Destrehan, Louisiana store.<sup>5</sup> At Green's direction, but not in his presence,

At all material times, Glenn A. Mueller (Mueller), chief executive offer/managing member, has been Respondent's supervisor and agent within the meaning of Sec. 2(11) and 2(13) of the Act.

At all material times, Scott Green (Green), store manager, has also been one of Respondent's supervisors and agents within the meaning of Sec. 2(11) and 2(13) of the Act.

Firmin completed his on line application using the computer in Green's office. As a part of this application process, Firmin electronically signed the AA, acknowledging that he read and agreed with it as required for employment. His signature also acknowledged that he understood the optout procedures offered in the AA. (Jt. Exh. 1.) He did not ask Green if he could be hired without electronically signing the AA, nor did he ask any other questions about the AA. Green in turn did not inform Firmin that he could be hired if he did not electronically sign the AA. Firmin was hired, and began working for Respondent as a pizza delivery driver at Respondent's Destrehan, Louisiana store. Firmin did not subsequently inform Respondent that he wished to opt out of the AA.

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On January 1, 2013, Firmin voluntarily resigned from his employment with Respondent.

On July 23, Firmin filed a complaint against Respondent in the Unites States District Court, Southern District of Mississippi Southern Division, alleging violations of the Fair Labor Standard Act's (FLSA) minimum wage provisions. (Jt. Exh. 2.) He filed this complaint both individually and on behalf of a class of similarly situated delivery drivers. On August 15, Respondent's counsel sent a letter to Firmin's counsel, notifying him of the AA. (Jt. Exh. 3.) This letter explained that the claims in Firmin's federal court complaint were specifically covered by the AA signed by Firmin, including a waiver of the right to arbitrate as a class representative or class member in a collective action, or otherwise. Respondent's counsel also requested that that Firmin dismiss the federal court claim on behalf of Firmin and other similarly situated employees, and if Firmin desired, pursue his individual claim pursuant to the terms of the AA. He explained that if Firmin did not dismiss his federal court complaint, that Respondent would be entitled to the recovery of all damages in responding to the lawsuit, to include attorney's fees, costs, and losses. Subsequently, on August 29, Firmin voluntarily dismissed the federal court complaint, without prejudice. (Jt. Exh. 4.)

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On September 17, Firmin filed an Arbitration Demand and Statement of Claim individually and on behalf of a purported class of similarly situated individuals with the American Arbitration Association (AAA). (Jt. Exh. 5.) On October 22, Respondent filed an answer to Claimant's statement of claim and a motion to dismiss regarding Firmin's class action allegations filed with the AAA. (Jt. Exh. 6.) The motion to dismiss was never decided; rather, on December 26, the presiding arbitrator issued an order granting the parties' joint motion to approve settlement that included a settlement of all claims by Firmin. (Jt. Exh. 7.)

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On December 26 (and thereafter), Firmin's underlying unfair labor practice charge in the instant case was still pending before the NLRB's Regional Office.<sup>7</sup>

#### III. PARTIES' STIPULATED ISSUES

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Whether Respondent has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act

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At all times material, Respondent's counsel has been its agent within the meaning of Sec. 2(13) of the Act. Although not included in the stipulated facts, I note that Firmin, through his counsel, served a written, formal request to withdraw his initial and amended charges filed with the Region. This request was denied. (R. Exh. 6.)

by generally maintaining and enforcing the terms of the AA that precludes class or collective actions, and by:

1. Enforcing the terms of the AA by requiring Charging Party Firmin to relinquish his class claim in the United States District Court, Southern District of Mississippi Southern Division (federal court) and threatening the payment of attorney's fees, costs, and losses if the lawsuit was not dismissed.

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2. Filing a motion to dismiss Charging Party Firmin's class arbitration claim and requesting that the AAA dismiss the claim based on the class and collective action waiver in Respondent's AA.

#### IV. DISCUSSION AND ANALYSIS

As indicated above, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by maintaining its AA, which precludes employees from filing class or collective arbitrations or lawsuits, by requiring Firmin to relinquish his federal class action complaint filed on his and other employees' behalf and by filing a motion to dismiss class allegations with the AAA. I agree and find the violations alleged.

#### A. The Positions of the Parties

The General Counsel argues, and I agree, that this matter is controlled by the Board's holding in D.R. Horton, Inc., 357 NLRB No. 184 (2012), which was denied enforcement in relevant part, 737 F.3d 344 (5th Cir. 2013). In that case, the Board held that an employer violates Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement "requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial," because "the right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 357 NLRB No. 184, slip op. at 12. The Board also concluded that its finding was "consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy," and did not "conflict with the letter or interfere with the policies underlying the Federal Arbitration Act (FAA)." Id. at 10. Thus, the General Counsel contends that such a ban on employees' rights to pursue class and/or collective actions, as contained in Respondent's AA, unlawfully interferes with employees' Section 7 rights. The General Counsel also argues that although Respondent's AA excepts claims filed with the NLRB and includes an opt-out provision, such exceptions do not insulate Respondent from prohibitions established in *D.R. Horton*.

Respondent disputes the controlling effects of the Board's decision in *D.R.* Horton, arguing that it is not viable based on current Supreme Court precedent, the United States Court of Appeals for the Fifth Circuit's partial overruling of *D.R. Horton*; and numerous state and federal courts' rejection of the Board's reasoning and findings set forth in *D.R. Horton* and their refusal to invalidate arbitration agreements containing class action waivers. Respondent also asserts that the terms of its AA in this case are distinguishable from the mutual arbitration agreement analyzed in *D.R. Horton* because its AA expressly excludes claims that are brought before the NLRB, includes an opt-out provision which renders the AA and class and collective

action waiver voluntary, and allows its employees to act in concert with other applicants or employees under the NLRA. Respondent further argues that Section 7 of the Act does not provide Firmin or any other of its employees the right to pursue class or collective action litigation in any forum, and further, that Firmin did not engage in any protected, concerted activity by filing a class action complaint and demand for class arbitration. Finally, Respondent contends that its efforts to enforce its AA's class action waiver were constitutionally protected conduct under the First Amendment.

#### B. D.R. Horton is Controlling

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Although the Fifth Circuit, as well as several other courts as set forth in Respondent's brief, disagreed with the Board's finding that a class or collective action waiver was illegal, and that such finding conflicted with the FAA, I am bound by the findings in *D.R. Horton* until either the Board or the Supreme Court specifically overturns them. *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Herbert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," and "for the Board, not the judge, to determine whether precedent should be varied.") (citation omitted). *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

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Similarly, I reject Respondent's insistence that I should deviate from the Board's findings in *D.R. Horton* because they are contrary to subsequent Supreme Court's decisions in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668–669 (2012) and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). (R. Br. at 12–13). Respondent asserts that the Supreme Court in these cases has stated that the FAA mandates enforcement of arbitration agreements unless justification to override them is established by a "contrary Congressional command." Respondent also contends that the Supreme Court has applied this principle to employment related arbitration agreements (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Granite Rock Co. v. Int'l. Brotherhood of Teamsters*, 130 S.Ct. 2847, 2858 (2010). Although the Supreme Court has upheld the enforcement of individual mutual arbitration agreements in these and other cases, the Court has not addressed or resolved the issue of exclusive arbitration over class and/or collective actions under the Act.

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I reject Respondent's argument, which appears for the first time in its brief, that the Board's decision in *D.R. Horton*, issued on January 3, 2012, is invalid since on the date of its issuance the Board lacked a quorum and was unconstitutionally constituted (R. Br. at 11–12, fn. 2, citing *New Process Steel v. NLRB*, 1380 S. Ct. 2635, 2640 (2010) and *Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S. Ct. 2861 (2013)). The Fifth Circuit rejected a similar argument made in the *D.R. Horton* case itself, albeit for technical reasons. 737 F.3d at 350–352. Further, the Board has rejected this same contention when raised in other cases. See *Belgrove Post Acute Care*, 359 NLRB No. 77, slip op. 1, fn. 1 (2013); *Bloomingdale's Inc.*, 359 NLRB No. 113 (2013). On June 26, 2014, the Supreme Court did issue a narrow ruling that the President's recess appointments made on January 4, 2012, were invalid because he did not have the authority to make them. *NLRB v. Noel Canning*, 573 U.S. \_\_\_\_ (2014). However, the Supreme Court in *Noel Canning* addressed the recess appointments made by the President on January 4, 2012, the day after *D. R. Horton* decision issued. Moreover, I am bound by and agree with the substantive holdings and principles in *D.R. Horton*, and find, as discussed below, that they are not contrary to Supreme Court precedent, and further, are well reasoned and predicated on well established, valid Board law.

Therefore, I disagree with Respondent's view that these subsequent cases lead to a decision contrary to that of the Board's in *D.R. Horton*. I understand, as the Board pointed out, that the FAA establishes a liberal policy favoring arbitration agreements. 357 NLRB No. 184, slip op. at 8. However, in *D.R. Horton*, the Board found that "the Supreme Court's jurisprudence under the FAA, permitting enforcement of agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to 'forgo the substantive rights afforded by the statute." Id. at 9–10, citing *Gilmer*, supra at 26. I find in this case, the NLRA is neither preempted by, nor in conflict with, the FAA, because Respondent effectively precluded Firmin and other of its employees from exercising their substantive rights under Section 7 of the Act.

In *American Express Co.*, supra, the Supreme Court dismissed a claim brought by a group of merchants, that their agreement to arbitrate individual claims as the sole method of resolving disputes was invalid, and concluded that when federal statutory claims are involved, the FAA's directive can only be "overridden by a contrary congressional command." However, *American Express Co.* is distinguishable from the instant case because it did not involve the substantive Section 7 right of employees to collectively file class action lawsuits or arbitrations, which was the basis of the Board's *D.R. Horton* decision. Nor did it involve, as in this case, an employer who compels its employees to waive those rights. For the same reasons, the Supreme Court's decision in *CompuCredit*, supra, is distinguishable. Moreover, these general consumer litigation and commercial cases do not address the central question of how and to what extent the FAA may be used to interfere with, by way of private agreements, the fundamental substantive right of workers to engage in concerted activity established and protected by the NLRA—the gravamen of the violation here and in *D.R. Horton*. 11

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Likewise, I reject Respondent's reliance on the Supreme Court's recognition in these cases that the texts of the federal statutes involved (such as the antitrust statutes in *CompuCredit*), do not "mention" class actions, and the Court's reference to its earlier decision in *Gilmer*, in which it upheld a class action waiver even though the Age Discrimination in Employment Act (ADEA) permitted collective actions. 136 S.Ct. at 673 and 133 S.Ct. at 2311. In further contrast, the ADEA, addressed in *Gilmore*, has as its central purpose the protection of older workers from discrimination in the workplace, whereas here, the NLRA expressly mandates as its core purpose the "right to engage in collective action—including collective legal action." of disputes challenging employment related rights of employees. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 12.

The Board distinguished *Gilmer*, in that it "addresses neither Section 7 nor the validity of a class action waiver," and involved an individual claim and an arbitration agreement without any language specifically waiving class or collective actions. 357 NLRB No. 184, slip op. at 10, fn. 22.

The Supreme Court in *CompuCredit* invalidated an arbitration agreement waiving the ability of consumers to sue a credit card marketer and the card's issuing bank in court for alleged violations of the Credit Organization Act (CROA).

Both *CompuCredit* and *American Express Co.*, were decided subsequent to *D.R. Horton*, but did not mention it.

C. Respondent Violated Section 8(a)(1) of the Act by Maintaining and Enforcing the Terms Of Its AA that Preclude Class or Collective actions, Notwithstanding, Exceptions Regarding NLRB Claims or Opt-out Provisions

An employer violates Section 8(a)(1) by maintaining work rules that tend to chill employee Section 7 activities. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Rules explicitly restricting Section 7 activities violate Section 8(a)(1). *Lutheran Heritage Village - Livonia*, 343 NLRB 646 (2004). But where a workplace rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. Id. at 647. If a rule explicitly infringes on the Section 7 rights of employees, the mere maintenance of the rule violates the Act without regard for whether the employer ever applied the rule for that purpose. *Guardsmark v. NLRB*, 475 F.3d 369, 375–376 (DC Cir. 2007).

Indeed, the Board in *D.R. Horton* relied on these principles in finding that the mandatory arbitration agreement violated Section 8(a)(1) because it expressly restricted protected activity by requiring employees to "refrain from bringing collective or class claims *in any forum*." 357 NLRB No. 184, slip op. at 5. This conclusion is based on the determination that "*employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA." Id. at 3. In other words, the Board in its reasoning provides that an employer may require arbitration on an individual basis if it does not preclude employees from all class or collective judicial options.* 

Further, the Court and Board have long held that concerted legal action addressing wages, hours, and working conditions constitute concerted protected activity under Section 7 of the Act. *D.R. Horton*, 357 NLRB No. 184, slip op. at 2–3, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (filing of a civil suit by employees is protected activity). Again, the Board has repeatedly made clear that the right to engage in collective action, including legal action, around these types of issues is a fundamental right specifically protected by the NLRA and is "the foundation on which the Act and Federal labor policy rest." 357 NLRB No. 18, slip op. at 10. In this case, Respondent has not only prohibited collective concerted activity, but did the opposite of what the Board in *D.R. Horton* specifically forbid, expressly limiting its employees to individual arbitration as the sole venue for disputes, and requiring all employees, including those drivers referenced in Firmin's class claim, to forgo their substantive right to collectively pursue legal action. Respondent expressly required this in its AA, and enforced it through its efforts, including threat of attorneys' fees and costs, to get Firmin to dismiss his federal complaint and its motion to dismiss Firmin's class arbitration claim.

Although the AA here does not restrict access to the Board, it unlawfully precludes all other substantive collective legal action in a court or arbitral forum as addressed above. In *D.R. Horton*, the mutual arbitration agreement was unlawful, not just because it restricted access to the Board, but also because it prohibited other collective legal action. Thus, I find that Respondent's AA and its class or collective action waiver in this case violates Section 8(a)(1) not

because it does or does not allow its employees to file charges with the Board, but because it interferes with and restricts its employees from engaging concerted activity, i.e., bringing class or collective action regarding employment disputes in any forum at all. The fact that Respondent's AA provides that employees may file charges with the Board does not cure this defect or rather, make its actions lawful.

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Likewise, I disagree with Respondent's argument that because its AA expressly allows its employees to act in concert with others, without fear of discipline (even for actually brining class and collective claims), their Section 7 rights have been sufficiently preserved. Respondent also maintains that its AA therefore allows other non-legal action among its employees such as allowing them, for example, to discuss their individual claims, to serve as witnesses in each others' individual actions or to assist in those actions, and to pool their resources towards those efforts. Those employees, however, would obviously be precluded, for example, from joining with employees who had opted out, consciously or by failing to meet the unreasonable 30-day deadline, to pursue resolution of employment-related disputes through litigation or arbitration. They would certainly, and reasonably, be hesitant to engage, or even chilled from engaging with, those employees who opted out, or not, to strategize regarding such matters given the otherwise prohibitive language in Respondent's AA. Nevertheless, Respondent does not escape liability from expressly restricting its employees from filing a class or concerted action in any and all forums.

Respondent's attempt to insulate itself from liability by way of its AA's opt-out provision also fails. Respondent claims its AA differs from the one at issue in D.R. Horton, in that its onetime opt-out opportunity makes the AA voluntary, thereby rendering it lawful under the Act, and creating a balance between its goals associated with its AA and the Act. However, the purpose of the Act, to balance to the inequality of bargaining power between employees, who are not on the same standing, and employers "who are organized in the corporate or other forms of ownership association" simply cannot be ignored here. 29 USC § 102. Indeed, the very act of requiring employees, especially new employees, to affirmatively make a decision to permanently waive their future rights protected under the Act, within a short time period (30 days of employment or of signing the AA), creates a smokescreen and serves to restore the inequity the Act intends to restore. Such a requirement is also an unreasonable burden which presumes that employees will have considered, without representation, complex legal rights and consequences, many of which cannot reasonably be foreseen. It matters not, as Respondent suggests, that the Board in D.R. Horton did not address this issue, and in fact, referenced such an issue as presenting a "more difficult question." 357 NLRB No. 184, slip op. at 13, fn. 28. It is clear here that the AA with its class action waiver and opt-out provision not only chills Firmin's (and other employees') Section 7 concerted activity, but imposes an unlawful burden on him and other employees to irrevocably relinquish certain fundamental employment rights. This is true whether employees decide to opt out or not. Further, the Board has consistently established that employees may not be required to prospectively waive their statutory rights. Ishikawa Gasket American, Inc., 337 NLRB 175, 176 (2001).

Respondent also seeks to disavow administrative law judge decisions in which the judges rejected the argument that an opt-out provision rendered an arbitration agreement voluntary, and therefore, legal under the Act. (See R. Br. citing, e.g. *24 Hour Fitness USA, Inc.* (Case 20–CA–035419, Nov. 6, 2012). Although I understand that administrative law judge decisions are not

precedent I agree with the reasoning in those decisions that such opt-out provisions do not preclude a finding of violation of the Act. (R. Br.) I do not agree with Respondent's reliance on contrary administrative law judge decision, *Bloomingdale, Inc.*, Case 31–CA–071281, June 25, 2013), for the reasons set forth above.

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Next, Respondent argues that Firmin did not engage in protected, concerted activity by filing a class action complaint and demand for class arbitration. Respondent asserts that there is no evidence that Firmin engaged in any activity "with or on authority of others," or sought support of others before filing his complaint, and that the mere filing of a class complaint is not enough to engage protection of the Act. (R. Br.) Respondent also claims, and cites cases in support thereof, that it is necessary to present evidence that the employer had knowledge that there existed legitimate and actual evidence of concerted activity. (See R. Br. at 6.) These arguments also fail. The Board in *D.R. Horton* recognized that an individual who files a class or collective action, whether in court or through arbitration, clearly seeks to induce or initiate group action and is engaged in collective activity protected by Section 7. 357 NLRB No. 184, slip op. at 3. Moreover, the Board has long held that concerted activity can include actions of a single person who "seek[s] to initiate or to induce or to prepare for group action." *Meyers Industries*, 281 NLRB 882, 885–887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). I agree with the Board's recognition in *D.R. Horton* 

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I also reject Respondent's argument that its interference with Firmin's efforts to pursue his FLSA claims in federal court (by sending its August 15, 2013 letter to Firmin's counsel) and to dismiss Firmin's request for class arbitration are protected by the First Amendment. Respondent's reliance on the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 (1983), is misplaced. In *Bill Johnson's*, 461 U.S. at 737, fn. 5, the Supreme Court, in its formulation of an accommodation between Section 7 rights and the First Amendment, clearly stated that the Board could in fact enjoin a lawsuit that seeks relief that is unlawful under the NLRA, and also cited several authorities where that had been done and approved by the courts.<sup>12</sup> Thus, this explicit exclusion from the Court's analysis of lawsuits with "an objective that is illegal under federal law," applies to the instant case where I have already found that Respondent violated the Act by maintaining its AA's class action waiver and enforcing it by using threats to influence Firmin to withdraw his federal complaint and filing a motion to dismiss his class arbitration claim. Id.

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Finally, I reject Respondent's assertion that this case should be dismissed because Firmin attempted to withdraw the underlying charge. The Regional Director obviously did not grant this request, and caused the complaint in this case to be issued.

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For the foregoing reasons, I find that Respondent has been interfering with, restraining, and coercing employees in the exercise of rights of Firmin and its other employees, guaranteed under Section 7, in violation of Section 8(a)(1) of the Act by maintaining and enforcing the terms of its AA that preclude class or collective action in any forum; requiring Firmin to relinquish his class or collective claims in federal court and threatening imposition of attorney's fees and other

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Citing e.g., Granite State Joint Board, Textile Workers Union, 187 NLRB.636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), revd., 409 U.S. 213 (1972); Booster Lodge No. 405, Machinists & Aerospace Workers, 185 NLRB 380, 383 (1970), enfd. in relevant part, 148 U.S. App. D.C. 119, 459 F.2d 1143 (1972), affd., 412 U.S. 84 (1973).

costs if the suit was not dismissed; and moving to dismiss Firmin's class arbitration claim before the AAA. This is true despite the NLRB claim exception and opt-out provision contained in the AA in question.

#### CONCLUSIONS OF LAW

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- 1. Respondent RPM Pizza, LLC, is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 10 2. By maintaining and enforcing the terms of its arbitration agreement that waives the right of its employees/team members to file and maintain class and collective actions in all forums, judicial and arbitral, Respondent violated Section 8(a)(1) of the Act.
- 3. By enforcing an arbitration agreement, with its class action waiver, by threatening Firmin with attorney's fees and costs if his federal lawsuit was not dismissed, Respondent violated Section 8(a)(1) of the Act.
- 4. By enforcing an arbitration agreement and class action waiver by asserting the provisions thereof and filing a motion with the AAA to have Firmin's class arbitration claim dismissed, Respondent violated Section 8(a)(1) of the Act.
  - 5. The above violations are unfair labor practices within the meaning of the Act.
- 6. Respondent's conduct found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices set forth above, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent's arbitration agreement is unlawful, Respondent shall be ordered to rescind or revise such arbitration agreement to make clear to all of its employees/team members, as defined in the arbitration agreement, that the agreement does not constitute or require a waiver in all forums of their right to maintain collective or class actions, and shall notify such employees and team members of the rescinded or revised policy by providing them a copy of the revised policy or specific written notification that the policy has been rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

#### ORDER

Respondent RPM Pizza, LLC, Gulfport, Mississippi, its officers, agents, successors, and assigns, shall

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#### 1. Cease and desist from

- (a) Maintaining, enforcing, or seeking to enforce any arbitration agreement and/or policy that waives the right of employees/team members to file and maintain class or collective actions in all forums, arbitral and judicial, and which applies irrevocably to those employees/team members who fail to opt out.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
- (a) Rescind or revise the arbitration policy to make it clear to all of its employees/team members, as defined in the arbitration agreement, that the agreement does not constitute or require a waiver in all forums of their right to maintain collective or class actions.
  - (b) Notify the employees/team members of the rescinded or revised policy by providing them a copy of the revised policy or specific written notification that the policy has been rescinded.
- (c) Within 14 days after service by the Region, post at its Gulfport, Mississippi, Destrehan, Louisiana, and all other of its facilities where the AA at issue has been in effect copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the posted hard copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the
- 40 notice to all current employees and former employees employed by the Respondent at any time since January 26, 2011.

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If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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5	(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
	Dated, Washington, D.C. July 11, 2014
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	Donna N. Dawson
	Administrative Law Judge

#### **APPENDIX**

#### NOTICE TO EMPLOYEES

#### Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain on your behalf with your employer Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a binding arbitration agreement (AA) that waives the right of employees/team members to file or maintain class or collective action in all forums, arbitral or judicial.

WE WILL NOT enforce or seek to enforce arbitration agreements by threatening employees/team members with attorney's fees or costs if they do not dismiss class or collective claims.

WE WILL NOT enforce or seek to enforce arbitration agreements by filing motions to dismiss class or collective action lawsuits or arbitrations and to compel individual arbitration pursuant to terms of the AA.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees/team members in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL NOT require our employees/team members to sign binding arbitration agreements that prohibit class and collective litigation in all forums, judicial and arbitral.

WE WILL rescind or revise the arbitration policy to make it clear to all of its employees/team members, as defined in the arbitration agreement, that the agreement does not constitute or require a waiver in all forums of their right to maintain collective or class actions.

WE WILL notify the employees/team members of the rescinded or revised policy by providing them a copy of the revised policy or specific written notification that the policy has been rescinded.

## RPM PIZZA, LLC (Employer)

Dated	By	
	(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov.">www.nlrb.gov.</a>

600 South Maestri Place, 7<sup>th</sup> Floor, New Orleans, LA 70130-3408 (504) 589-6361 Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at <a href="https://www.nlrb.gov/case/15-CA-113753">www.nlrb.gov/case/15-CA-113753</a> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389